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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BRUNSWICK CORPORATION,

Petitioner,

vs.

RIEGEL TEXTILE CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Respondent fraudulently obtained a patent from the United States Patent Office for an invention which it had misappropriated from petitioner. Respondent's patent monopoly has barred petitioner from competing with respondent, and also has prevented petitioner from licensing its invention to other manufacturers that would have competed with respondent.

The Patent Office's Board of Interferences had exclusive primary jurisdiction to decide whether petitioner or respondent has a prior claim to the invention, and the Board instituted an interference proceeding to determine which claim has priority. That proceeding was still pending when petitioner filed this suit, which alleges that respondent's fraudulent procurement and maintenance of its unlawful patent monopoly violated the federal antitrust laws.

The questions presented are as follows:

1. Whether the four-year statute of limitations under the antitrust laws (a) is tolled during the pendency of a proceeding before an administrative agency (the Patent Office Board of Interferences) which has exclusive primary jurisdiction to determine an issue of central importance to the resolution of an antitrust claim, or (b) does not bar petitioner's claim because respondent's unlawful conduct continued into the statutory period.

2. Whether a party directly injured by a competitor's fraudulent procurement and maintenance of a patent monopoly, which precludes that party and others in the market from engaging in competition, has suffered antitrust injury and has standing to seek antitrust damages even though it is entitled to a lawful patent for the same invention.

The Seventh Circuit's decision on the first question is in conflict with decisions of this Court and the Ninth and Sixth

Circuits. The Seventh Circuit's decision on the second question conflicts with past decisions of this Court.

STATEMENT REQUIRED BY RULE 28.1

Petitioner Brunswick Corporation ("Brunswick") has no parent corporation. Brunswick's affiliates and subsidiary corporations, except wholly owned subsidiaries, are Devil's Lake Sioux Manufacturing Corp. (North Dakota), Enhanced Energy Systems, Inc. (New Mexico), Mercspader, Inc. (South Dakota), Nireco-Brillig Instruments, Inc. (California), Nuvatec, Inc. (Delaware), Bolos El Dorado S.A. (Panama), Brunswick GmbH (West Germany), Brunswick Recreation Centers, Ltd. (Hong Kong), Nihon Regulator Company Ltd. (NIRECO) (Japan), Nippon-Brunswick K.K. (Japan) and Sugita Seisakusko Co. Ltd. (Japan).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Brunswick Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 19, 1984.

OPINIONS BELOW

The opinion of the court of appeals is reported at 752 F.2d 261 (1984). It appears in the Appendix to this petition at A-4,

et seq.[1] The opinion of the district court is reported at 578 F. Supp. 893. It appears in the Appendix at A-22 *et seq.*

JURISDICTION

The judgment of the court of appeals was entered December 19, 1984. A timely petition for rehearing was denied January 18, 1985, and this petition is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. § 1 and 2, Sections 4, 4B and 7 of the Clayton Act, 15 U.S.C. § 15, 15b and 18 and Sections 122, 135, 141 and 146 of the Patent Laws, 35 U.S.C. § 122, 135, 141 and 146. These provisions appear in the Appendix, at A-1-3.

STATEMENT OF FACTS

This antitrust suit was filed in 1982 by petitioner Brunswick Corporation, which charges that Riegel Textile Corporation, through use of a fraudulently acquired patent monopoly, has prevented Brunswick and others from competing with it, to Brunswick's injury. The district court granted Riegel's motion to dismiss, and the court of appeals affirmed. Since this case was decided on motion to dismiss the complaint, we recite the facts as alleged in the complaint which is printed in the Appendix at A-35 *et. seq.*[2]

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[1] References to the appendix to this petition are cited as "A-____." The joint appendix in the court of appeals (for items not appearing in the appendix to this petition) is cited as "J. App.," which, as suggested in Rule 19.1, has not been filed with this Court.

[2] Several references are also to exhibits attached to plaintiff's brief opposing dismissal, which would warrant treating defendant's Motion to Dismiss as a Motion for Summary Judgment.

In 1967 Brunswick, which manufactures metal fibers, among other things, conceived and developed a process which made it possible to combine metal fibers with conventional fibers to make antistatic yarn for static-free fabrics. Antistatic fabrics are used in garments and draperies for hospital operating rooms and other areas containing volatile gases that can explode from static electricity generated by conventional fabrics. Complaint, ¶ 5, A-36. Commencing in 1968, Brunswick disclosed its invention in confidence to Riegel, a manufacturer of yarns and fabrics, and instructed Riegel's employees on the technology for making antistatic yarn. Riegel was to purchase the essential metal fibers from Brunswick, and it was understood that Riegel would not disclose the Brunswick process to others. Brunswick retained all of its rights to its process, except that it agreed that Riegel was to have a one year lead time over other companies to whom Brunswick might disclose or teach the process. ¶ 8, A-37.

In November 1969, Brunswick refused to extend Riegel's exclusive lead time beyond August 1970 because it wanted to expand its market "to other textile manufacturers who would be able to manufacture and sell antistatic fabrics in competition with Riegel and develop additional products . . . from yarn made with the Brunswick Blending Process. The expanded use . . . would also be a source of royalty income, if Brunswick elected to license the technology." ¶ 13, A-38. Riegel thereupon devised a scheme to obtain a monopoly position in the manufacture and sale of antistatic yarn and fabric.

By February 1970, Riegel had obtained underwriter's approval and commenced using the trade name "Riegelstat" in marketing its antistatic fabrics. On April 20, 1970, William G. Klein, the Brunswick employee who had developed the process, filed a patent application on behalf of Brunswick to protect its invention. ¶ 14-15, A-38; Heimovics affidavit,[3] A-59.

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[3] The affidavit was attached to Brunswick's Memorandum in Opposition to Riegel's Motion to Dismiss the Complaint.

However, on August 14, 1970, two Riegel employees "at the instigation of Riegel falsely and fraudulently filed in the United States Patent Office a patent application claiming that they had originated and invented the process . . . which Brunswick had disclosed to Riegel." The object was to "illegally continue Riegel's exclusive position in the manufacture of antistatic yarns and fabrics." ¶ 16, A-39.

Although Brunswick had filed its application three months ahead of Riegel, the Patent Office, apparently unaware of Brunswick's application, on November 21, 1972 issued a patent to Riegel for the process Brunswick had invented. ¶ 17, A-39. Patent applications are kept confidential by the Patent Office (35 U.S.C. § 122), and until the patent was issued to Riegel Brunswick had no knowledge of Riegel's scheme to obtain a patent on the process.

After the patent was issued to Riegel, a Brunswick attorney, in early 1973, questioned Riegel's patent counsel as to Riegel's claim of invention and supplied him with a Brunswick laboratory entry which showed that the process had been developed by Brunswick prior to July 19, 1968. Riegel's counsel agreed to check into the matter, and, shortly thereafter, assured the Brunswick attorney that Riegel had a valid patent. ¶ 23, A-41; Heimovics Affidavit, A-59.

On March 6, 1975, the Patent Office, pursuant to 35 U.S.C. § 135, declared a patent interference proceeding between Brunswick's pending application and Riegel's issued patent to determine the priority of invention. This proceeding was still being contested in the Patent Office by Riegel at the time Brunswick filed this action on July 14, 1982, although Riegel at all times knew that its patent "was improperly issued as a result of its fraudulent misrepresentation of inventorship". ¶ 20, A-40.[4]

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[4] The Board rendered its decision on November 4, 1983, A-67. It concluded that "Goodbar [Riegel] has failed to establish conception

(footnote continued on following page)

"Riegel persists in continuing to contest Brunswick's claim to prior inventorship in the interference proceeding which still is pending * * * [and] continues to assert that it has a lawful patent monopoly * * *". (*Ibid.*) "Riegel's continuing false and fraudulent claims of priority of invention in the patent interference proceeding have directly and proximately injured Brunswick" in a number of specified ways. ¶ 25, A-43. Thus Riegel's unlawful monopolistic conduct has continued into the four-year period prior to the commencement of this suit.

The facts set forth above appear in paragraphs 5-24 of Count I of Brunswick's complaint, and are realleged in counts III, IV and V, which assert violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. A-45-51.

These counts (paragraphs 80-84, 116-117 and 149) allege that Riegel's fraudulently obtained patent monopoly had the effect of depriving Brunswick of a market for its metal fibers and also prevented Brunswick from licensing its process to other yarn and fabric manufacturers. A-46-50. These other textile manufacturers would be prevented from utilizing the

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(footnote continued from previous page)

or a reduction to practice of any count in issue . . . prior to Klein's [Brunswick's] filing date" (A-83.), and that "Klein had conceived and reduced to practice the invention "prior to the earliest dates" alleged by Riegel's employees in their preliminary statement. A-84. The Board did not reach the question of Riegel's fraud, stating that it was not timely raised by a motion to dissolve under 37 CFR § 1.231. A-84. Overruling the Primary Examiner, the Board also held that the description of invention in Brunswick's application was inadequate to support Brunswick's claims. For this reason, the Board not only declined to issue a patent to Brunswick, but awarded Riegel priority even though it found Brunswick was the inventor. On November 30, 1983, pursuant to 35 U.S.C. § 146, Brunswick instituted a proceeding to review the adverse portions of the Board's decision in the United States District Court for the Northern District of Illinois, No. 83 C 8726. The issues of priority and patentability are still pending before that court.

Brunswick process and from producing antistatic yarn and fabrics in competition with Riegel's monopoly.[5]

A reading of these paragraphs in full demonstrates that Brunswick alleged not only that it was prevented from competing by Riegel's monopolistic conduct, but also that all other manufacturers of fabrics were prevented from competing with Riegel as well. This meant that these potential customers of Brunswick and Riegel, and their customers (hospital gown manufacturers and the hospitals), were deprived of the opportunity to buy in a competitive market. The court of appeals, ignoring these allegations of injury to competition, theorized, independently of the record, that Riegel's monopoly could not affect any consumers or customers.[6]

Counts III, IV and V prayed for damages consisting of a reasonable royalty for the wrongful appropriation and use of Brunswick's Blending Process by Riegel; for "profits Brunswick would have made on sales of metal fibers if potential customers had not believed that Riegel had the exclusive right to the Blending Process under its fraudulently procured patent"; and for "expenses, costs and legal fees disbursed by Brunswick as a result of Riegel's fraudulent claims of priority of invention in the patent interference proceeding". These counts also prayed that Riegel be ordered to transfer to Brunswick all its rights under its Antistatic Yarn Production Patent 3,703,073 and any equivalent foreign patents. A-47-51.

A stay order halting most discovery was entered by agreement of the parties on August 26, 1982 (J.App. 101-113) to await the expected decision of the Board because the parties recognized that the underlying facts in the antitrust case and the

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[5] Riegel "has been and is the only manufacturer of . . . antistatic woven fabrics suitable for operating room apparel and sheeting." Complaint, ¶ 12, A-46-47.

[6] Riegel's sales of antistatic fabric to only three of its customers in the period up to 1982 exceeded $27,000,000. (Exhibit 2 to Brunswick's Memorandum in Opposition to Motion to Dismiss.)

Interference Proceeding before the Board were largely the same and involved common questions of fact and law. Indeed, in a motion to transfer the review of the interference proceeding from Judge Bua to Judge Aspen, who had dismissed the antitrust case, Riegel stated:

> "To the extent that Brunswick's allegations of 'theft' and 'fraud' form a material part of its claims in each action, the cases involve the same issues of fact and law." (J.App. 393)

On January 7, 1983, the district court agreed to permit defendant to file a motion under Rule 12. J. App. 138-140. On June 24, 1983, Riegel filed its motion to dismiss on the grounds that Brunswick's complaint "failed to state a claim upon which relief can be granted", and that Brunswick's claims were "barred by the applicable statute of limitations and Brunswick's lack of antitrust injury."

On December 19, 1983, the District Court filed an opinion and entered judgment dismissing the antitrust counts of the complaint (III, IV and V) as barred by the statute of limitations, and the pendent state law counts (I, II and VI) under this Court's decision in *United Mine Workers* v. *Gibbs,* 383 U.S. 715, 726 (1966). A-31.

The court of appeals, in an opinion by Judge Posner, held that Brunswick's claim was time barred because the pendency of the administrative proceeding before the Board of Interferences did not toll the running of the statute of limitations. The court also held that the repetition and continuance of Riegel's fraud to maintain its patent monopoly was not an antitrust violation within the statutory period. The court further held that Brunswick did not allege injury under the antitrust laws because a finding that Riegel unlawfully obtained its patent might entitle Brunswick to obtain a lawful patent covering the same process. In short, the court treated the difference between a lawful patent and one obtained by fraud as irrelevant and of no legal consequence.

REASONS FOR GRANTING THE WRIT

Ths case presents two questions worthy of review by this Court.

1. (a) The court of appeals refused to follow the decision of the Ninth Circuit in *Mt. Hood Stages* v. *Greyhound Corp.*, 616 F.2d 394 (9th Cir.), cert. denied, 449 U.S. 831 (1980), which, on remand from this Court (437 U.S. 322, 337 (1978)), held that the same statute of limitations as is involved here was tolled during the pendency of an administrative proceeding before an agency which had primary and exclusive jurisdiction to decide an issue of critical importance to the antitrust case. After first "question[ing] the wisdom" of *Mt. Hood,* the court of appeals sought to distinguish it on grounds inconsistent with its reasoning, and also with the reasoning of this Court in *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289 (1973), and of the Sixth Circuit in *Deltec, Inc.* v. *Laster,* 326 F.2d 443, 444 (6th Cir. 1964). The question whether antitrust cases must be brought while proceedings are still pending in the Patent Office or other administrative agencies to determine an issue which is prerequisite to the antitrust decision is important to the enforcement of the patent and antitrust laws and to administrative agencies generally.

Litigation involving fraud on the Patent Office and the interface between the patent and antitrust laws has increased substantially following this Court's decision in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* 382 U.S. 172 (1965). If antitrust plaintiffs may not await the results of Patent Office proceedings with assurance that the antitrust limitations period will not expire, premature "protective" suits will impose unnecessary burdens on the district courts and the litigants. In view of the conflict between the Seventh Circuit's decision and the Ninth Circuit's ruling in *Mt. Hood* and the importance of rationally coordinating proceedings between federal district courts and the administrative agencies, including the Patent Office, review by this Court of this question is fully warranted.

(b) In addition, the court of appeals rejected Brunswick's argument that the statute of limitations did not bar a suit based on the reiteration of Riegel's fraudulent representations before the Board of Interferences, during the four years preceding the filing of the complaint, in order to continue to maintain its unlawful patent monopoly. This conclusion is inconsistent with the decisions of this Court and courts of appeals holding that an action based on continuing exclusionary conduct causing continuing injury within the statutory period is not time barred.

2. The holding of the court of appeals that the principal potential competitor of a defendant who had obtained and maintained a patent monopoly by fraud has no right to seek antitrust damages is inconsistent with the reasoning of this Court's decisions on antitrust standing. The unlawfully obtained patent foreclosed all competition by Brunswick with the defendant, and also, as used by Riegel, between Riegel and customers and consumers down the line. The fact that an adjudication of Riegel's fraud might result in the granting of plaintiff's patent application in the future should not deprive plaintiff of the right to recover the damages caused by defendant's antitrust violation. This Court's decisions, as well as those of courts of appeals, establish that the primary "competitor in the market in which trade was restrained" (*Associated General Contractors* v. *Carpenters,* 459 U.S. 519, 539 (1983)) has standing to recover antitrust damages.

The decision of the court of appeals ignores the principles recognized in decisions of this Court that competitors, as well as consumers, are protected by the antitrust laws. It also ignores the Congressional purpose to protect competitors against monopolistic practices in order to ensure the vigor of the competitive process, thus safeguarding the interests of consumers who are the ultimate beneficiaries of competition.

The Seventh Circuit's narrow focus on consumer injury, to the exclusion of competitive injury, clashes with prior decisions of this Court defining antitrust injury, and cannot be reconciled

with this Court's holding in *Walker Process* that persons injured by fraudulent patent monopolies have a right to redress under the antitrust laws. Inventions and patents are important in our high technology society; the Seventh Circuit's decision erroneously has placed an obstacle to effective enforcement of the antitrust laws in this significant segment of the economy.

I.A. THE HOLDING OF THE COURT BELOW THAT THE STATUTE OF LIMITATIONS WAS NOT TOLLED DURING THE PENDENCY OF THE PATENT OFFICE INTERFERENCE PROCEEDING IS CONTRARY TO THE REASONING OF THE NINTH AND SIXTH CIRCUITS AND OF THIS COURT.

The Patent Office instituted its interference proceeding in March 1975, two and a half years after the issuance of the patent to Riegel. Brunswick could not have known of Riegel's patent fraud until Riegel obtained its patent on November 21, 1972, since, as required by 35 U.S. § 122, patent applications are kept confidential by the Patent Office until the patent is granted. Indeed, Riegel made a special effort to ensure that Brunswick did not know. Ex.3, A-56-57. The four year antitrust period of limitation thus had not expired when the interference proceeding was begun.

Congress has vested initial authority to determine "the question of priority" in the Patent Office Board of Interferences. 35 U.S.C. § 135(a). That Board's decision as to priority is "final", unless overturned on direct review either by the court of appeals for the Federal Circuit or by a district court, whose decision is then appealable to the Federal Circuit. 35 U.S.C. §§ 141, 146.

Accordingly, the question whether a party has priority of invention, which can be refuted by proof that it had made fraudulent representations to that effect to the Patent Office, has been committed by Congress to the primary jurisdiction of the Board of Interferences — and no one else — to decide. The

Sixth Circuit so held in *Deltec, Inc.* v. *Laster,* 326 F.2d 443, 444 (6th Cir. 1964), which Judge Posner's opinion mentions but does not distinguish. That court there held that an antitrust suit alleging fraud on the Patent Office was "prematurely brought" because the Patent Office (and a reviewing court) "had exclusive jurisdiction to hear and determine the interference proceeding." That ruling is inconsistent with the Seventh Circuit decision in this case, since the statute of limitations cannot require that a suit be brought during the period in which the suit will be dismissed as premature.

Riegel's right to its patent is a principal question in this antitrust case. Brunswick's position has consistently been that its antitrust cause of action is predicated upon a finding that Riegel's assertion of patent priority was fraudulent and therefore unlawful, and that Riegel had therefore not established priority. The Board of Interferences found (A-69, A-83) that Brunswick, not Reigel[7], had established priority of inventorship, without reaching the question of fraud[8], but then ruled for Riegel on other grounds which have been challenged in another suit in the district court (N.D. Ill., No. 83 C 8726) under Section 146 of the Patent Law. Since a prerequisite to Brunswick's antitrust claim and damages was a determination of the question of patent priority over which the Patent Office had exclusive initial jurisdiction, there was no reason to *require*

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[7] The opinion uses the names of the individual inventors, Klein for Brunswick and Goodbar for Riegel, in referring to the claims.

[8] The statement in the court of appeals opinion (A-17, 752 F.2d at 270) that "the issue of fraud, apparently, was never presented to the Patent Office as part of the interference proceedings" is shown to be incorrect by the Board's opinion, which includes among the issues Brunswick's "allegation that Riegel's patent was obtained fraudulently." A-69. The Board declared that "this question is not reached because it was not timely raised by way of a motion." The issue having been presented to the Board, no one could know prior to its decision in November 1983 what it would decide. The final decision, of course, will be that of the court in the suit to review the Board's decision.

the antitrust suit to be brought before the Patent Office proceeding was concluded.

This was the reasoning of the Ninth Circuit in *Mt. Hood Stages* v. *Greyhound Corp.*, 616 F.2d 394 (1980). The court there held that the antitrust statute of limitations was tolled during the pendency of the proceeding before the Interstate Commerce Commission to determine whether the Commission's approval of Greyhound's acquisition of other bus lines should be modified or vacated, in part because of Greyhound's misrepresentations to the Commission. The Commission, like the Board of Interferences here, had primary and exclusive jurisdiction over that question. To require that question to be submitted to a court before the termination of the administrative proceeding would have been a waste of judicial resources, and, indeed, premature, as *Deltec* holds. See pages 10-11, *supra*. And, with the interference proceeding going on, the filing of an antitrust suit was not necessary to put Riegel on notice that the fraudulent nature of its patent were being challenged.

The district court supported its contrary conclusion on the ground that "patent validity is neither a matter within the primary jurisdiction of an administrative agency nor a public issue of regulatory concern." A-26, 578 F. Supp. at 897. The court of appeals also seems to have assumed (A-13, 752 F.2d at 268) — incorrectly — that Brunswick was arguing "that the Patent Office has primary jurisdiction over any dispute over patent validity." But, as stated above, the question of patent *priority* was committed to the Patent Office Board; patent *validity* in other respects was not.[9] The district court also relied on the fact that "factual adjudications of the Patent Office ***

[9] The Patent Law Amendments Act of November 8, 1984, for the first time gave a new merged Board of Patent Appeals and Interferences authority over "questions of patentability" as well as "questions of priority". Sec. 202 of Public Law 98-622 (H.R. 6286), amending 35 U.S.C. § 135(a).

are not necessarily conclusive". But neither are findings of the Interstate Commerce Commission, or most other agencies.

The court of appeals thought it significant that, apart from priority, the interference proceeding and this antitrust case involved other issues which were different, as they did. Obviously, Brunswick would have to establish more than priority and fraud to recover damages in an antitrust case. *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965). See p. 15-16, *infra.* But in *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289, 302-305 (1973), this Court held that antitrust litigation should be stayed so long as "some facets of the dispute . . . are within the statutory jurisdiction of the" administrative agency, and "adjudication of that dispute by the [agency] promises to be of material aid in resolving" the dispositive issue in the antitrust suit. As demonstrated above, Brunswick's standing to assert its antitrust claims and obtain the relief it is requesting depends on its showing that it, not Riegel, was the original inventor of the process in question,[10] and that issue was within the exclusive jurisdiction of the Patent Office Board. Thus, as in *Ricci* and *Mt. Hood,* there was no reason here to require the antitrust action to be filed before the underlying issue of priority was determined in the Patent Office.

The Interstate Commerce and the Patent Acts and the procedures under them are, of course, not identical. But the same reasons justify requiring initial resort to the agencies administering those statutes, as well as other statutes, for decision on issues over which Congress has vested the agencies with exclusive primary jurisdiction and which are essential to a determination of the judicial proceeding.

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[10] This issue of inventorship is also directly related to the violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, alleged in Count V of the complaint, which charges that Riegel (a corporation), by obtaining its fraudulent patent, illegally acquired the invention, which was an asset of Brunswick (a corporation), and that this acquisition had a substantial adverse affect on competition.

B. RIEGEL CONTINUED ITS ANTICOMPETITIVE ACTS WITHIN THE LIMITATIONS PERIOD.

The complaint filed in 1982 alleged that Riegel "continues", in the still pending interference proceeding, to make the false and fraudulent claims of priority of invention, and that these continue to injure Brunswick. Complaint, ¶¶ 20, 25, A-40, 43. The allegations, in the present tense, of a continuing antitrust violation and continuing injury resulting therefrom, include conduct occurring during the four years immediately before the filing of the complaint, during all of which the interference proceeding was going on and Brunswick's injury continued. It is well settled that continuing injury caused by continuing exclusionary conduct gives "rise to continually accruing rights of action." *Poster Exchange, Inc.* v. *National Screen Service Corp.*, 517 F.2d 117, 128 (5th Cir. 1975), cert. denied, 424 U.S. 1054 (1976), which relies on *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). In the instant case, Riegel's initial act of obtaining a patent for Brunswick's process was not "a violation final at its impact" or "by its nature permanent at initiation without further acts". *Poster, supra,* at 126-127, followed in *Imperial Point Colonnades Condominium* v. *Mangurian,* 549 F.2d 1029, 1035 (5th Cir.), cert. denied, 434 U.S. 859 (1977). Rather, Brunswick has suffered additional damage from Riegel's reiteration and continued use of its misrepresentations in order to maintain its monopoly, which might otherwise have terminated. Since Brunswick has alleged that Riegel's false submissions in the interference proceeding throughout the four-year limitations period continued to exclude Brunswick from the market and forced it to incur enormous litigation costs, Brunswick's claim is not time barred. The submissions of false information in the course of the interference proceeding were separate acts in Riegel's continuing antitrust violation. See cases cited page 23, *infra.*

The ruling below that there was no continuing violation is not only inconsistent with the principles enunciated in the cases cited above, but is in direct conflict with the holding of the District Court of Columbia Circuit that "the misappropriation and continuing use of a trade secret [which is similar to a patent for this purpose] does constitute a continuing tort" for limitation purposes. *Underwater Storage, Inc.* v. *United States Rubber Co.*, 371 F.2d 950, 953 (D.C. Cir. 1966), cert. denied, 386 U.S. 911 (1967).

This continuing conduct of Riegel would entitle Brunswick to damages occurring during the four year period preceding the filing of the complaint, even if the statute was not tolled from 1972 to 1982 for the reasons previously stated.

The court of appeals refused to regard Riegel's conduct during the statutory period as a continuation or repetition of the violation on the grounds that Riegel was "simply defending itself", and "the original fraud was not an antitrust violation because it had no tendency to harm consumer interests." A-19, 752 F.2d at 271. Whether Riegel's effort to maintain its unlawful monopoly is "simply defending", which is questionable, is irrelevant; the repetition of representations known to be untrue is a continuance of the antitrust violation. And the court of appeals' antitrust theory in itself presents an important question for reasons stated immediately below.

II. THE HOLDING THAT PETITIONER DID NOT ESTABLISH ANTITRUST INJURY IS CONTRARY TO BASIC ANTITRUST PRINCIPLES ENUNCIATED BY THIS COURT.

This Court held in *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 176-177 (1965), that a person injured by a monopoly obtained through a fraud on the Patent Office may recover damages "for the fraudulent procurement of the patent coupled with the violations of 2" of the Sherman Act. This means, as Justice Harlan's concurring opinion explained (*id.* at 179-180), that the plaintiff

in such a case must prove that the defendant has procured the patent by "willful fraud" and also "all the elements otherwise necessary to establish a § 2 monopolization charge."

Brunswick's complaint alleged Riegel's willful fraud in procuring its patent, the resulting injury to competition, and the economic monopoly Riegel achieved through its unlawful conduct. The court of appeals held that the complaint did not allege facts which would establish injury of the sort the antitrust laws were designed to prevent. This ruling, which is clearly inconsistent with the decisions of this Court, presents an important issue of antitrust law.

Counts III and IV of the complaint (¶¶ 80-84, 116-117, A-46-49) allege that Riegel's fraudulently obtained patent created an unlawful monopoly which prevented any other manufacturer of antistatic fabrics from using Brunswick's process and from producing fabrics in competition with Riegel, and that Riegel's fraud also deprived Brunswick of a market for the metal fibers used by manufacturers of antistatic fabrics. These are certainly the types of injury from unlawful monopolization which "the antitrust statute was intended to forestall". *Associated General Contractors* v. *Carpenters,* 459 U.S. 519, 540 (1983); *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 489 (1977) ("[t]he injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.")

Riegel's patenting of the invention stolen from Brunswick prevented Brunswick from selling its fibers and from licensing the process it invented to anyone who might have competed with Riegel. That is direct anticompetitive injury suffered by the party at whom the monopolizing conduct was primarily aimed. The unlawful monopoly eliminated all competition; it did not merely remove Brunswick as a competitor. As Professors Areeda and Turner, in their treatise on *Antitrust Law* (Vol. II, ¶ 340a (1978)), have stated:

> "A plaintiff has undoubted standing to recover the injuries resulting from the antitrust violation of his 'direct' competitor. Such standing is so clear that it is seldom challenged." *Id.* at 205.

Nevertheless, Judge Posner's opinion would deprive Brunswick of any right to recover damages caused by Riegel's anticompetitive, monopolistic conduct because the process covered by Riegel's unlawful patent might then be lawfully patented by Brunswick, the *true inventor.* But it makes no sense as a matter of patent or antitrust policy to hold that a plaintiff injured by a defendant's fraud in obtaining a patent and monopolizing a market has no antitrust remedy if and because the effect would validate plaintiff's own patent application. Where, as here, a patent is obtained by means of false claims of invention, the policies underlying the patent grant are not served by affording the non-inventing patentee immunity from the antitrust laws. The fact that the underlying invention might be patentable by another, thus giving rise to a lawful patent monopoly in a different period of time, cannot alter the fact that the patent monopoly procured through fraud on the Patent Office does not fall within the limited exception to the law against monopolies designed to encourage and reward a true inventor.

In *Precision Instrument Mfg . Co.* v. *Automotive Maintenance Mach. Co.,* 324 U.S. 806, 816 (1945), and *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.,* 382 U.S. 172, 177 (1965), this Court said:

> "A patent by its very nature . . . is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope."

Justice Harlan, concurring in *Walker,* added (382 U.S. at 179-180) that the allowance of

> "damages for Sherman Act monopolization knowingly practiced under the guise of a patent procured by deliberate fraud, cannot well be thought to impinge upon the policy of the patent laws to encourage inventions and their disclosure. *Hence, as to this class of improper patent monopolies, antitrust remedies should be allowed room for full play.*" (Emphasis supplied.)

All of the other elements for a § 2 monopolization charge were alleged here. The fact that Brunswick would be granted a patent for a subsequent period is no reason for preventing it from recovering its losses caused by Riegel's unlawful conduct.

Judge Posner's opinion emphasizes that the antitrust laws were designed to protect consumers. That is true, but not the whole truth. They also were designed to protect potential competitors unlawfully excluded from the market. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979), which removed any doubt as to whether consumers had standing to sue for damages, certainly did not imply that no one else, such as injured competitors, had standing, or could recover damages only when injury to consumers was also proved.

The opinion below concedes, as it must, that "competitors as well as consumers still have standing to complain about antitrust violations", but only because and when they "are thought to be effective (maybe indispensable) surrogates" for consumers who do not sue for themselves. A-9, 752 F.2d at 266. Under this narrow theory, a competitor injured by an unlawful monopolist cannot recover damages unless it can also show that consumers would be injured. Nothing said by this Court supports any such theory. Indeed, the only Supreme Court case cited by the court of appeals is *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), which, as we show below, neither holds nor says anything of that sort; neither have the lower courts — and this includes the numerous recent

Seventh Circuit cases[11] and the few cases from other circuits[12] cited in the opinion below.

Furthermore, the court's theory ignores the fact that consumers were and are still being injured by having to pay royalties or higher prices to Riegel during the period since 1972 in which it has been exploiting its unlawful patent monopoly. This is so even if Brunswick prevails in this case and in the future obtains a patent of its own and collects royalties. The court below was not entitled to assume — as a matter of economic theory — what the record does not show, that Brunswick would charge the same royalties or maintain a monopoly such as Riegel has, which prohibited competition by any licensee.[13]

The argument that, because Brunswick was not "motivated by altruism" and might in the future recover royalties from licensing its own metal fiber customers, consumers would not benefit from depriving Riegel of its unlawful patent, is pure

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[11] "[T]he statutory language does not restrict the treble damage remedy solely to consumers"; "§ 4 protects only those persons injured as consumers *or competitors.*" *In re Industrial Gas Antitrust Litigation,* 681 F.2d 514, 519-520 (7th Cir. 1982) (emphasis supplied). There must be "competitive injury in the antitrust sense." *Sutliff, Inc.* v. *Donovan Cos.,* 727 F.2d 648, 655 (7th Cir. 1984).

[12] *Mishler* v. *St. Anthony's Hospital Systems,* 694 F.2d 1225, 1228 (10th Cir. 1981) is discussed in the next footnote. *Almeda Mall, Inc.* v. *Houston Lighting & Power Co.,* 615 F.2d 343, 353-354 (5th Cir. 1980) ("no injury to competition" when power company with lawful monopoly which sells directly to tenants of shopping mall refused to sell to mall at lower rates for resale to tenants at same rates they were paying power company).

[13] The statement in *Mishler* v. *St. Anthony's Hospital Systems,* 694 F.2d 1225, 1228 (10th Cir. 1981), cited in the opinion below, that "[w]e assume that doctors do not all deliver identical services for identical fees" applies to other occupations as well. The court there held that a monopoly's preclusion of a doctor from practicing "inherently involves injury to the public and competition," and not merely a "private wrong in which revenues were diverted from one set of doctors to another."

speculation, unsupported by anything in the record. On the contrary, the complaint alleges (¶ 116, A-48) that Riegel's conduct prevented other antistatic yarn or fabric manufacturers "from using the Brunswick Blending Process and preventing others from producing light-weight and medium-weight antistatic woven fabrics suitable for operating room apparel and sheeting in competition with Riegel." These excluded manufacturers and their customers down the line were the consumers who, in addition to Brunswick, were damaged by Riegel's monopolization. An exhibit included in the record, by attachment to Brunswick's Memorandum in Opposition to Riegel's Motion to Dismiss (J. App. 269 *et seq.*), showed that Riegel allowed only a single licensee to produce antistatic yarn made in accordance with Riegel's technology, and then for resale only to Riegel. Ex. 12, A-62 *et seq.* at A-65.

On the other hand, the complaint alleges (¶13, A-38) that Brunswick "wanted to expand the market for [its] metal fibers to other textile manufacturers who would be able to manufacture and sell antistatic fabrics in competition with Riegel and develop additional products," and that Brunswick was deprived of the right to license its process "to Riegel and others" (Complaint ¶¶ 80-84, 116-117, A-46-49). Licensing by Brunswick of a number of other customers would have created a more competitive market for the benefit of customers and consumers. Judge Posner's speculation that the economic effects of Brunswick's licensing would be identical with Riegel's is thus not only entirely theoretical but inconsistent with what the complaint alleged.

The possibility that Brunswick, the party directly injured, may not pass on any damages it may recover to persons down the line who may in the future obtain licenses from it, or buy goods containing its products, does not bar it from recovering damages. That is established by *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), and *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968).

The assertion in the opinion below (A-12, 752 F.2d at 268) that "our analysis is supported by a more illustrious case bearing Brunswick's name[14]—*Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)" rests on too narrow a reading of that case and others as to the "sort of thing the antitrust laws seek to discourage." In that case plaintiffs were asserting injury because Brunswick's acquisitions left them with more competition rather than less, obviously not the type of conduct at which the antitrust laws were aimed. *Bowl-O-Mat* defined antitrust injury as injury which reflected "the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation" (429 U.S. at 489); this undoubtedly includes injury to competitors, not merely consumers. Judge Posner's conclusion (A-12, 752 F.2d at 268) that Riegel's conduct "has no tendency to injure anyone intended to be benefited by the antitrust laws" assumes that those laws are intended to protect *only* consumers, not, as here, a competitor excluded by an unlawful monopoly. Neither this Court nor any other has so held. See p. 18-19, *supra*.

In the Court's most recent reexamination of the subject in *Associated General Contractors* v. *Carpenters*, 459 U.S. 519, 538 (1983), the Court recognized that a purpose of the antitrust laws was to protect consumers, but also that an object was to protect competitors. The Act "was enacted to assure customers the benefits of price competition, and our prior cases have emphasized the *central interest in protecting the economic freedom of participants in the relevant market.*" The Court pointed out that the union in that case "was neither a consumer *nor a competitor in the market in which trade was restrained.*" (*id.* at 539, emphasis supplied). The union's interest in that case was in collective bargaining, not in competing. See also Areeda & Turner, quoted at p. 17, *supra*. The Court included as "relevant factors" to determine standing, the directness or

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[14] If this Court grants certiorari in this case, the *Bowl-O-Mat* case might not be more illustrious.

indirectness of the asserted injury (*id.* at 540), the "tenuous and speculative character of the relationship between the alleged antitrust violation and the . . . alleged injury . . . and the existence of more direct victims of the alleged conspiracy." (*id.* at 545). Here Brunswick was the most direct and intended victim of the unlawful monopoly. The relationship between its injury and the unlawful monopolization was neither tenuous nor speculative. Riegel's unlawful conduct precluded Brunswick from competing with Riegel and from licensing its invention to others who might have competed with Riegel or its licensees.

The court of appeals suggested that questions of "unfair competition" or "legal ethics" are not appropriate for disposition in an antitrust forum (A-10, 20, 752 F.2d at 267, 272). But if the essential ingredients of an antitrust violation are shown to exist, as they are in this case, a person should not escape antitrust liability because his conduct may also be deemed unfair or unethical. In any event, no premium should be placed on fraud, and such factors are relevant in determining the reasonableness of an alleged restraint or monopolization. This Court has so held with respect to fraud on the Patent Office, which is what this case involves.

The respondent says that a fraudulently obtained patent can be the basis for an antitrust claim of unlawful monopolization only after an affirmative suit or suits by the patentee to enforce the patent. But the institution of proceedings to enforce a patent is not an additional requirement when the fraudulent patentee is the defendant. The argument to the contrary disregards the plain language of this Court in the *Walker* case. The Court there stated that proof of "willfully misrepresenting facts to the Patent Offce . . . would be sufficient to strip [a patentee] of its exemption from the antitrust laws" (382 U.S. at 177). See the concurring opinion of Justice Harlan, *id.* at 179. The opinions then add that the same would be true for a defendant who "was not the original patent applicant" if "he

had been enforcing the patent with knowledge of the fraudulent manner in which it was obtained." (*id.* (concurring opinion)), or was "an assignee who maintains and enforces the patent with knowledge of the patent's infirmity" (*id.* at 177). Thus enforcement need be shown only when the defendant is not the original applicant who perpetrated the fraud on the Patent Office. Respondent's argument that the antitrust plaintiff must prove that a fraudulent patentee had subsequently brought suits for enforcement is inconsistent with the distinction which the Court so carefully drew in the *Walker* case. Here Riegel orchestrated and was the direct and principal participant in the intentional fraud in both the patent application and the interference proceeding, not an innocent purchaser of a patent later discovered to have been fraudulently obtained.

The court below and respondent argue that a patentee's fraud in defending a suit to nullify a patent cannot support an antitrust claim, and that reliance on willful and knowing fraud in an interference proceeding instituted by the Patent Office, not the plaintiff, should be similarly treated. The courts and commentators, however, have uniformly declared that the submission of false information or the assertion of baseless claims in administrative proceedings can support a claim for relief under the antitrust laws. *See, e.g., Litton Systems, Inc.* v. *American Telephone & Telegraph Co.*, 700 F.2d 785, 811-812 (2nd Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984); *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259-61 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 1234 (1983); *Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972); *Woods Exploration & Producing Company, Inc.* v. *Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). P. Areeda, *Antitrust Law* 28, 32 (1982 Supp.); R. Bork, *The Antitrust Paradox* 353 (1978).

Whether or not Riegel was plaintiff, defendant, or respondent when it deliberately utilized false statements to obtain

or continue an unlawful monopoly should be of no consequence. The sham litigation cases cited above do not turn on the question whether the defendant initiated the proceedings in which the sham conduct occurred. It is the corruption of the administrative process for anticompetitive purposes that violates the antitrust laws, and there is no basis in logic or policy for immunizing litigation abuse by defendants. As two leading commentators have stated:

> "The litigation process might be abused not only by initiating suit improperly, but also by improperly conducting it. Bribing a judge, *ex parte* contacts, perjury, and similar behavior are certainly not privileged. Such conduct can be exclusionary when appropriately connected to the attainment, preservation or expansion of monopoly power."

III P. Areeda & D. Turner, *Antitrust Law* 285 (1978). See also *The Use and Abuse of Judicial Proceedings as an Antitrust Violation,* 46 Antitrust L. J. 741, 745 (1977).

Thus, if, as Brunswick has alleged, Riegel pressed baseless claims of inventorship and submitted false information in support of those claims during the patent interference proceedings in order to preserve a monopoly position achieved through fraudulent procurement of a patent, Riegel has violated Section 2 of the Sherman Act.

The restrictive interpretation given the antitrust laws by the court below would contravene both antitrust and patent policy. There is no reason to strain to give those laws an unnatural and unnecessarily narrow meaning, contrary to their purpose and this Court's decisions. The issue presented is therefore, we submit, worthy of review by this court.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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